RECORD AND BRIEFS

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No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR, ET AL,

Petitioners,

v.

STATE OF WISCONSIN, ET AL.,

Respondents.

On Writ of Certiorari to the State of Wisconsin Court of Appeals

BRIEF OF WISCONSIN REALTORS® ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a regulatory takings case, does the "parcel as a whole" concept as described in *Penn Central Transportation v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly-owned, contiguous parcels, must be combined for takings analysis purposes?

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INTERESTS OF *AMICUS CURIAE*[1]

The Wisconsin REALTORS® Association ("WRA") is a non-profit, professional trade association of member REALTORS® and affiliates in the State of Wisconsin. The WRA membership consists of approximately 13,500 real estate agents, brokers, developers, and other real estate professionals throughout the state. The WRA represents its members before the Wisconsin Legislature, state regulatory agencies, and federal, state and local courts on a wide range of issues to promote the interests of the real estate industry and property owners throughout Wisconsin, including questions pertaining to the authority of governmental entities to regulate the use, development and transfer of real property. As the state's largest real estate association, the WRA has a direct and active interest in protecting the constitutional rights of property owners, including their Fifth Amendment rights.

In this brief, the WRA offers an additional viewpoint on the error committed by the Wisconsin Court of Appeals. It wrongly concluded that, in a regulatory takings case, the "parcel as a whole" concept described in *Penn Central Transportation v. City of New York*, 438 U.S. 104, 130-31 (1978), establishes a rule that two legally-distinct, but commonly-owned, contiguous

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[1] No counsel for a party authorized this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Counsel of record for all parties received timely notice of amicus curiae's intention to file this brief pursuant to Supreme Court Rule 37.2(a). The parties have consented to the filing of this brief.

parcels must be treated as a single property in a takings analysis.

The WRA and its members have an active interest in the "parcel as a whole doctrine" and its impact on the use, development and sale of adjacent lots. The WRA's members work directly with buyers, sellers and developers of real estate. Vacant lots are common in local real estate markets and are often owned by adjacent property owners, who intend to sell or develop the lots. By requiring contiguous property in common ownership to be combined for purposes of a takings analysis, the Wisconsin Court of Appeals' decision will discourage common ownership of contiguous property, decrease property values, and adversely impact local real estate markets throughout Wisconsin.

SUMMARY OF ARGUMENT

The Wisconsin Court of Appeals ruled that the "parcel as a whole" concept requires all contiguous lots in common ownership to be combined for purposes of a regulatory takings analysis (the "Wisconsin Rule"). This bright-line rule, unreviewed by the state supreme court, is inconsistent with the facts and the holding in *Penn Central* and with this Court's other decisions.

Penn Central involved the proposed segmentation of air rights from a single parcel of land owned in fee simple. This Court rejected the segmentation theory — a single parcel of property cannot be divided into individual property rights for purposes of a takings claim. The Court explained that takings law does not separate an individual parcel of property into discrete segments and, then, evaluate whether the rights in any one segment have been taken. Rather, a takings analysis must focus on all the rights in the "parcel as a whole."

Since *Penn Central*, the Supreme Court has consistently applied the "parcel as a whole" rule in cases involving the segmentation of property into separate property interests. However, the Court has not yet applied the rule to cases involving the combination of individual parcels of land. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). The Wisconsin Court of Appeals' decision squarely presents this issue.

The Wisconsin Rule fails to treat individual parcels of land as separate and distinct pieces of property for takings analysis purposes—an error that brings the Wisconsin court's decision into conflict with basic concepts of "property" as defined in Wisconsin and by this Court. This Court has consistently treated individual parcels of land, and individual rights associated with the land, as property for purposes of the Fifth Amendment. In addition, the Wisconsin Rule is inconsistent with the treatment of individual lots as property by Wisconsin's Subdivision and Platting Law, Wisconsin's Eminent Domain Law, and Wisconsin's Shoreland Zoning Law.

Finally, the Wisconsin Rule will lead to arbitrary and unreasonable results, as well as confusion and unfair treatment of property owners. The financial risks associated with the common ownership of adjacent lots will increase, creating a financial disincentive to purchase adjacent lots that could adversely impact economic development and the real estate market.

I. THE WISCONSIN RULE IS INCONSISTENT WITH *PENN CENTRAL* AND OTHER SUPREME COURT CASES.

The Wisconsin Court of Appeals asserted that the "parcel as a whole" ruling in *Penn Central* requires the adjacent parcels under common ownership to be evaluated as a single property in regulatory takings claims. (Ct. App. ¶¶ 18 and 20) That court's bright-line rule is inconsistent with the facts and holding in *Penn Central* as well as other Supreme Court cases.

A. *Penn Central* Involved The Segmentation Of Air Rights From A Single Parcel Of Land Owned In Fee Simple.

In *Penn Central*, the property owner argued that the New York City Landmark Commission's zoning decision, denying an application to build a 55-story office building above Grand Central Terminal, deprived the property owner of its air rights. 438 U.S. at 118, 130. The property owner claimed the permit denial resulted in a taking, arguing that the right to build in the air space above Grand Central was itself a separate and valuable property right or "stick" in the bundle of rights possessed by fee-simple property owners. *See id.* at 130. The owner's argument attempted to segment "air rights" from the other rights associated with fee-simple ownership of property — the "segmentation theory." Thus, the owner maintained, the Landmark Commission's regulation "goes too far" because it deprived the owner of the entirety of the property's air rights. *Id.*

This Court rejected the segmentation theory. A single parcel of land cannot be segmented into individual property rights for purposes of a takings claim: "'Taking' jurisprudence does not divide a single parcel into discrete segments, and attempt to

determine whether rights in a particular segment have been entirely abrogated." *Id.* Rather, the Court explained, a takings analysis should focus on both "the character of the [government] action" and "the interference with rights in the parcel as a whole." *Id.* at 130-31. This Court further noted that the "parcel as a whole" in that case was a single parcel—the "landmark site." *Id.* at 131.

Moreover, this Court rejected a bright-line test for "determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). Instead, this Court adopted a three-part "balancing test" for regulatory takings cases as part of an "essentially ad hoc, factual inquiry." *Id.* at 124. Thus, whether a regulation produces a taking "depends largely 'upon the particular circumstances [in each] case.'" *Id.* (citations omitted). The Court eschewed a categorical rule in favor of flexibility.

Unlike the facts in the present case, *Penn Central* did not involve the combination of adjacent parcels.[2] And the Court did not suggest that the "parcel as a whole" theory should apply to multiple parcels owned by one person. Rather, the "parcel as a whole" theory in *Penn Central* precluded an effort to divide a single

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[2] In *Lucas v. South Carolina Coastal Council*, this Court noted that the New York Court of Appeals' decision under review in *Penn Central* had "examined the diminution in a particular parcel's value produced by a municipal ordinance in light of [the] total value of the takings claimant's other holdings in the vicinity ...." The Court characterized that view as "an extreme . . . and . . . unsupportable . . . view of the relevant calculus." *Lucas*, 505 U.S. 1003, 1016 n. 7 (1992).

parcel into separate segments of property rights within that parcel. Rightly so. Such segmentation would confound zoning codes and police power regulation of property. Nonetheless, in citing *Penn Central* as the basis for the Wisconsin Rule — requiring adjacent lots in common ownership to be combined in all cases for purposes of a regulatory taking — the Wisconsin Court of Appeals erred.

B. The Supreme Court Has Applied The "Parcel As A Whole" Rule Only To Segmentation Cases.

Since *Penn Central*, the Supreme Court has applied the "parcel as a whole" rule consistently in cases involving the segmentation of property into separate property interests. However, the Court has not applied the rule to cases involving the combination of separate parcels of land.

In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court upheld a federal regulation prohibiting the sale of artifacts made from the parts of protected birds, rejecting the argument that the prohibition on the right to sell the artifacts was a taking of a separate property right. *Id.* at 67-68. The Court stated, "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. Because the bird owners retained other rights associated with the property (e.g., rights to possess, transport, and donate), the Court found no taking.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court reaffirmed the "parcel as a whole" rule as it applied to segmentation theory claims. The property owners argued that Pennsylvania's subsidence protection law constituted

a regulatory taking because it required 27 million tons of coal to remain in the ground. Citing *Penn Central*, this Court rejected the physical segmentation argument, determining that "[t]he 27 million tons of coal do not [themselves] constitute a separate segment of property for takings law purposes." *Id.* at 498. In addition, the Court used the "parcel as a whole" rule to reject another claim by the owners — that the subsidence protection law took the claimants' support estate, which Pennsylvania law recognized as a separate property interest. *Id.* at 500-01. The Court reasoned that the theory of separating the support estate from the rest of the property owner's bundle of rights was flawed since "the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated." *Id.* at 501.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court declared that a 32-month development moratorium was not a *per se* taking because such a ruling would violate the "parcel as a whole" standard. Once again, the Court refused to carve property into distinct segments, explaining that an interest in land is defined by its legal description.

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest . . . Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not.

Id. at 331-32.

While these cases demonstrate that a property owner may not "conceptually sever" the regulatory portion of a parcel by simply "defining the property interest taken in terms of the very regulation being challenged," this Court has yet to apply the "parcel as a whole" rule to adjacent parcels of land. *Tahoe-Sierra*, 535 U.S. at 331. This Court's segmentation cases prevent property owners from *narrowing* the denominator by "conceptually sever[ing]" the regulated portion of the parcel directly impacted by the regulation from the remaining parcel. This case presents the Court with the opportunity to confirm the converse of this rule: the government cannot *enlarge* the denominator by "conceptually merging" the regulated parcel with an adjacent parcel. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

II. THE WISCONSIN RULE CONFLICTS WITH THE *VERY* DEFINITION OF PROPERTY.

A. A Parcel Of Land Is Considered Property For Purposes Of The Takings Clause.

"Property" is defined broadly:

> 1. Collectively, the rights in a valued resource such as land, chattel, or an intangible. It is common to describe property as a "bundle of rights." These rights include the right to possess and use, the right to exclude, and the right to transfer. 2. Any external thing over which the rights of possession, use, and enjoyment are exercised ....

Black's Law Dictionary 1410 (10th ed. 2014). More specifically, property has been regarded as "the highest right a man can have to anything; being used

for that right which one ha[s] to lands or tenements, goods or chattels, which no way depends on another man's courtesy." *Jackson v. Housel*, 17 Johns, 281, 283 (N.Y.Sup. Ct. 1820). Early legal scholars defined property as "certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition." 1 John Lewis, *A Treatise on the Law of Eminent Domain In The United States* 52 (3d ed. 1909) (footnote omitted).

Since the earliest days of American jurisprudence, this Court has treated a parcel of land owned in fee simple as property for purposes of the Fifth Amendment's Takings Clause. *See, e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (finding a taking after a state dam flooded a parcel of land); *United States v. Lynah*, 188 U.S. 445 (1903) (finding a taking after a river flooded a cotton field); *United States v. Cress*, 243 U.S. 316 (1917) (finding a taking after a dam and lock system flooded a parcel of land). Fee simple is the most complete form of ownership because the owner possesses all rights in the land. *See United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). In takings cases, where the title to a parcel of private land is clearly established, "the only question that remains is whether such property has been taken . . . for public use." *Hill v. United States*, 149 U.S. 593, 600 (1893) (Shiras, J., dissenting).

In evaluating whether the type or interest in property warrants protection under the Fifth Amendment, this Court often uses a parcel of land as the baseline for making the determination. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken

constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council,* 535 U.S. at 322 (internal citations omitted); *see also, Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-03 (1984) (citations omitted) (extending the definition of property for purposes of the Fifth Amendment to trade secrets, the Court stated the "general perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land"). As recognized by this Court, "a fee simple interest [in land has] . . . a rich tradition of protection at common law." *Lucas*, 505 U.S. at 1016 n.7.

While consistently treating individual parcels of land owned in fee simple as property for purposes of the Fifth Amendment, this Court also has considered individual rights or "sticks" associated with the land to be property. *See* Michael A. Heller, *The Boundaries of Private Property*, 108 Yale L.J. 1163, 1191 n. 146 (1999) (tracing the use of the "bundle of rights" theory to the late 1800s); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 899 (2000)(explaining that property is often conceived to be a "bundle of rights").

For example, in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), this Court found that the government's imposition of a navigational servitude requiring public access to a pond took the landowner's right to exclude others from the property and constituted a taking. *See also, Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (identifying the right to exclude others as one of the most essential sticks in the bundle of rights); *Lucas*, 505 U.S. at 1044 (1992) (Blackmun, J., dissenting) (recognizing the right to alienate land as a distinct property interest); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (a property owner's bundle of

rights includes the right to possess, dispose and exclude others) (citations omitted).

B. Individual Lots Are Property Under Wisconsin Law.

For purposes of the Fifth Amendment's Takings Clause, this Court has defined "property" by "existing rules or understandings that stem from an independent source such as state law." *Lucas*, 505 U.S. at 1030; *see, e.g., Armstrong*, 364 U.S. at 44, 46 (a materialman's lien is considered property under Maine law); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (a real estate lien is considered property under Kentucky law); *United States v. Craft*, 535 U.S. 274, 288 (2002) (a tax lien is considered property under Michigan law). These state laws define "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *General Motors*, 323 U.S. at 378. "[P]roperty rights protected by state law are deserving of the protection of the Taking Clause." *Ruckelshaus*, 467 U.S. at 1003.

1. The Wisconsin Rule Conflicts With Wisconsin's Subdivision And Platting Law Recognizing Individual Lots As Property.

In Wisconsin, like most states, the process for subdividing raw land into individual lots and parcels is a formal process regulated at both the state and local levels.[3] As established by Wisconsin's Subdivision and

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[3] A subdivision plat is required any time a landowner divides a lot, parcel, or tract of land for the purpose of sale or building development, where (1) the division creates five or more parcels of building sites of 1 ½ acres each or less, or (2) successive divisions within a five-year period create five or more parcels or building

Platting Law, the process requires a series of permits, reviews and approvals and is intended to, among other things, "promote the . . . general welfare of the community[] . . . [and] to further the orderly layout and use of land." *See* Wis. Stat. §§ 236.01 and 236.45(1).[4] The review and approval process is multi-faceted, with reviews and/or approvals required for both preliminary[5] and final plats by various state agencies and local governments. *See* Wis. Stat. §§ 236.11 (identifying the process for preliminary plat submittal and review) and 236.12 (identifying the final process for final plat submittal and review). When creating a subdivision, each lot must meet minimum width and area requirements,[6] must be clearly identified and given a separate number on the plat,[7] with all lot lines clearly marked and measured on the plat.[8] In addition, the exterior boundaries of each individual lot must be surveyed and permanently established by monuments.[9]

Once the plat is approved by all state and local authorities, the final plat must be recorded in the office of the register of deeds in the county where the subdivision is located. *See* Wis. Stat. § 236.25(1).

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sites of 1 ½ acres each or less. *See* Wis. Stat. § 236.02(12)(am). For the creation of lots or parcels that do not result in a subdivision, a certified survey map is required. *See* Wis. Stat. §§ 236.03(1) and 236.34(1).

[4] Unless otherwise indicated, all references to the Wisconsin State Statutes will be the 2013-14 version.

[5] Preliminary plats are optional unless required by local ordinance. *See* Wis. Stat. § 236.11(1)(a).

[6] Wis. Stat. § 236.16(1)

[7] Wis. Stat. § 236.20(2)(e)

[8] Wis. Stat. § 236.20(2)(c)

[9] Wis. Stat. § 236.15(1)(c)

When the plat is recorded, each lot "in that plat shall be described by the name of the plat and the lot and block in the plat for all purposes, including those of assessment, taxation, devise, descent and conveyance . . .." Wis. Stat. § 236.28. No plat or subdivision can be approved unless it shows the exterior boundaries of each lot or parcel of the proposed subdivision. Wis. Stat. § 236.20(2)(a).

In other words, each lot, regardless of whether it is contiguous to other lots in common ownership, has a separate and distinct legal identity and has to be identified as such for all purposes. Penalties are imposed for recording plats that fail to meet these requirements, for conveying title to lots without a recorded plat, and for removing or disturbing the monuments used for establishing individual lot boundaries. *See* Wis. Stat. §§ 236.30, 236.31, and 236.32.

Once a subdivision plat has been recorded, creating individual legal lots of record, strict limits are placed on the ability to alter boundaries or to change or vacate any portion of the plat or individual lots. The authority to vacate or alter any part of the subdivision or any legal lot of record is limited to (a) "[t]he owner of the subdivision or any lot in the subdivision," or (b) "[t]he county board if the county has acquired an interest in the subdivision or in any lot in the subdivision by tax deed." Wis. Stat. § 236.40. Unless a county has acquired an interest in a lot by tax deed, a county board may not vacate any portion of a lot in a subdivision. *Id.*

The Wisconsin Supreme Court has recognized that even courts have limited authority to vacate any portion of a subdivision plat once it has been properly recorded. *See In re Vacating Plat of Chiwaukee*, 36 N.W.2d 61, 63 (Wis. 1949) (indicating that courts could

only vacate parts of plats "'dedicated to and accepted by the public for use as a street or highway or as streets or highways'") (citation to statute omitted); *see also* Wis. Stat. § 236.43 (identifying the authority of courts and the process that must be followed to vacate or alter areas in a subdivision that have been dedicated to the public). Emphasizing the rights that each lot owner has when purchasing a legal lot of record, the court stated:

> As those statutes were in effect when the land was platted and when the objectors and their predecessors in title purchased their lots, they are imported as a matter of law into their contracts of purchase, and all of the relative rights and obligations of the parties are subject to the provisions of those statutes, including the manner and conditions under which the portion of the plat involved herein may be vacated.

Chiwaukee, 36 N.W.2d at 63. Vacating or altering the exterior boundaries of any recorded lot or subdivision is considered a "replat" and requires public notice, a judicial hearing, and compliance with the requirements of Chapter 236 of the Wisconsin Statutes. *See* Wis. Stat. §§ 236.02(11), 236.36, 236.41, and 236.42.

Contrary to Wisconsin's Subdivision and Platting Law, which establishes permanent, legal lot lines and boundaries and a specific process for altering those lot lines and boundaries, the Wisconsin Rule effectively erases the common boundary lines between adjacent, individually-platted and recorded lots for the purpose of a regulatory takings analysis. State law recognizes separate and distinct boundaries. The Wisconsin Rule does not.

2. The Wisconsin Rule Conflicts With Wisconsin's Eminent Domain Law Treating Individual, Contiguous Tax Parcels as Property

The Wisconsin Supreme Court has recognized the significance of individual tax parcels. *See, e.g.*, *Spiegelberg v. State of Wisconsin*, 2006 WI 75, ¶ 1, 717 N.W. 2d 641, 643. There, the court endorsed the property owner's approach to just compensation, requiring the effect of a taking to be evaluated separately for adjacent tax parcels, despite their common ownership. *Id.*

The property owner in *Spiegelberg* owned 150 acres of land divided into five contiguous tax parcels, all five of which were used as a farm. *Id.*, ¶ 2. The Wisconsin Department of Transportation ("WisDOT") condemned 11 acres spanning three of the five parcels for a highway project. The WisDOT proposed to pay just compensation based on the effect of the taking on all five parcels collectively. *Id.*, ¶ 15 (summarizing the WisDOT's position as: "if one person owns multiple parcels that are affected by a partial taking, all of the parcels must be valued as though they were one parcel"). The property owner objected and presented appraisal testimony showing the diminution in value was greater when the effects were evaluated on a parcel-by-parcel basis. *Id.*, ¶ 16.

In choosing between these approaches, the Wisconsin Supreme Court defined the issue in the same way as the issue presented by the Petitioners in this case: How should the "whole property" or the "denominator" be defined in a takings case? The court stated:

> The answer to this question turns on whether the "whole property" language of § 32.09(6)[10] requires that contiguous parcels be valued together as a single unit, or whether they can be valued individually with a sum total then calculated for their collective appraised values.

Id., ¶ 10 (footnote added).

The Wisconsin Supreme Court held that the effect of the taking should be evaluated on a parcel-by-parcel basis. *Id.*, ¶¶ 31-32. Thus, rather than adopt a bright-line rule that disregarded property lines, as did the Wisconsin Court of Appeals in this case, the court in *Spiegelberg* adopted a "flexible approach" that takes into consideration "the individual characteristics of each property," while respecting established property lines. *Id.*, ¶ 33.

3. The Wisconsin Rule Conflicts With State And Local Grandfathering Laws.

By requiring contiguous lots under common ownership to be combined for purposes of a takings analysis, the Wisconsin Rule conflicts with state laws and ordinances that protect the development rights of each individual lot, regardless of whether they are contiguous and owned by the same person.

Wisconsin grandfathers substandard lots located in shoreland areas[11] under certain conditions, regardless

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[10] Wis. Stat. § 32.09(6) sets the parameters for just compensation in eminent domain proceedings involving partial takings.

[11] "Shorelands" are defined as all lands within "1,000 feet from a lake pond or flowage; and 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater." *See* Wis. Admin. Code § NR 115.03(8).

of whether they are adjacent to other lots in common ownership. *See* Wis. Stat. § 59.692(2m); *see also* Wis. Admin. Code § NR 115.05. Under the law, a "substandard lot" is defined as "a legally created lot or parcel that met minimum area and minimum average width requirements when created, but does not meet current lot size requirements." *See* Wis. Admin. Code § NR 115.05(1)(a)3.[12] Regardless of changes to minimum lot-size requirements[13] or other local land development regulations, a property owner is entitled to use the substandard lot as a building site if all of the following conditions apply:

> a. The substandard lot or parcel was never reconfigured or combined with another lot or parcel by plat, survey, or consolidation **by the owner** into one property tax parcel.
>
> b. The substandard lot has never been developed with one or more of its structures placed partly upon an adjacent lot or parcel.
>
> c. The substandard lot or parcel is developed to comply with all other ordinance requirements.

Id. (emphasis added). In other words, each individual substandard lot can be built upon unless the owner of

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[12] The state's current minimum lot-size requirements in shoreland areas for lots served by public sanitary sewer include a minimum average width of 65 feet and a minimum area of 10,000 square feet. *See* Wis. Admin. Code § NR 115.05(1)(a). Lots not served by public sanitary sewer are required to have a minimum average width of 100 feet and a minimum area of 20,000 square feet. *Id.*

[13] While these lot-size standards are referred to as "minimum standards," counties are prohibited from adopting lot-size standards or other development regulations in shoreland areas that are more restrictive than those standards established in Wis. Admin. Code ch. NR 115. *See* Wis. Stat. § 59.692(1d)(a).

the property has treated the lot as one parcel by either (1) merging the lot with an adjacent lot, or (2) building a structure that straddles both the substandard lot and an adjacent lot. In short, unless the owner has treated the lot as one parcel in either manner, counties are not allowed to prohibit structures from being constructed on substandard lots in shoreland areas.[14] *See* Wis. Stat. § 59.692(2m). These protections apply in unincorporated areas in all 72 counties throughout Wisconsin.[15]

Similar to Wisconsin, other state and local governments have adopted laws that grandfather all lots created before the effective date of any zoning changes. *See* Daniel R. Mandelker, *Land Use Law*, § 9.07, at 9-8 (6th ed. 2015). In Pennsylvania, for example, owners of subdivision lots are protected from future changes to zoning or subdivision regulations relating to lot sizes for five years after a subdivision plat is approved. *See* 53 Pa. Cons. Stat. § 10508(4)(ii); *see also* N.H. Rev. Stat. § 674.39 (2016) (grandfathering lots in a subdivision from future changes in

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[14] The Wisconsin Court of Appeals did not address, nor did the parties raise, the issue of whether the substandard lot provisions in St. Croix County's ordinance and Wis. Admin. Code § NR 118.08(4) are preempted by Wis. Stat. § 59.692(2m) and Wis. Admin. Code § NR 115.05(1)(a)3. The Wisconsin Legislature enacted and then amended Wis. Stat. § 59.692(2m) after St. Croix County denied the Murrs' request to sell one of the two contiguous parcels. *Compare* 2011 Wis. Act 170 (effective April 17, 2012) and 2015 Wis. Act 55 §§ 1922i and 1922j *with Murr v. St. Croix County Bd. Of Adjustment*, 2011 WI App 29, ¶¶ 5-6, 796 N.W.2d 837, 842 (recounting the procedural history of the zoning variances requested by the Murrs). If sub. (2m) had been in effect at the time the Murrs first sought approval to sell the second lot, the result could have been different.

[15] *See* Wis. Stat. § 59.692(1c)(requiring each county to zone all shorelands in unincorporated areas).

subdivision regulations for five years after subdivision plat is recorded). In Connecticut, any residential lot approved as part of a subdivision plan is not required to comply with future changes to local zoning ordinances. *See* Conn. Gen Stat. § 8-26a(b)(1) (2014); *see also* Mass. Gen. Laws ch. 40A, §§ 5 and 6 (2016) (protecting up to three adjoining and commonly-held lots for five years from the date of any changes making the lots nonconforming); Va. Code §§ 15.2-2261(c) and 15.2307 (2015) (protecting the developer from any changes to a subdivision plat for five years after the subdivision plat is approved, and protecting owner of a lot to develop the property under current land-use regulation if the owner relied in good faith on those regulations); *Marinelli v. Bd. of Appeals of Stoughton*, 797 N.E.2d 893 (Mass. 2005)(interpreting Massachusetts' vested rights law to grandfather three lots in common ownership if a party owns four or more lots).

In addition to statutory protections for the development of individual lots, states have common law vested rights doctrines that provide similar protection for lot owners from future changes to lot-size requirements and other development regulations. *See, e.g.*, *Noble Manor Co. v. Pierce County*, 943 P.2d 1378 (Wash. 1997) (finding that Washington's vested rights law protects property owners from changes in minimum lot-size requirements enacted after subdivision plat was submitted for approval); *Morgenstern v. Town of Rye*, 794 A.2d 782 (2002) (finding that New Hampshire's common law vested rights doctrine protects an owner's right to develop a substandard lot).

Wisconsin and other states have statutory and common laws that protect the rights of owners of all individual lots under certain conditions. These laws

do not distinguish between lots based upon contiguity or common ownership with other lots. Rather, each individual lot is treated the same. By treating some lots differently than others for purposes of a regulatory taking claim, the Wisconsin Rule conflicts with these laws.

III. THE WISCONSIN RULE WILL LEAD TO ARBITRARY AND INEQUITABLE RESULTS.

In determining whether individual lots are protected under the Fifth Amendment, the Wisconsin Rule considers only two factors — contiguity and common ownership. By ignoring all other facts and circumstances, the Wisconsin Rule will result in arbitrary and unreasonable regulatory decisions, as well as confusion for and unfair treatment of property owners. Outcomes produced by the Wisconsin Rule are easily found:

- Timing of acquisition. Two contiguous lots owned by the same person and purchased at the same time must be treated the same as two contiguous lots owned by the same person and purchased 20 years apart. *See, e.g., Cane Tennessee, Inc. v. United States*, 60 Fed. Cl. 694, 700-701 (2004) (finding that interests in property held by a common owner should not be aggregated because they were acquired at different times over approximately 18 years).

- Owner's investment-backed expectations. Four contiguous lots owned by the same person — purchased for the purpose of building one residence with large, open-space buffers between neighboring properties — must be treated the same as four contiguous, downtown lots owned by the same person

purchased for the purpose of building separate commercial buildings on each lot. *See Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 903 (Fed.Cir.1986), *cert. denied* 479 U.S. 1053 (1987) (finding that the property owner's investment backed expectations to mine limestone deposits on entire 1560-acre parcel were damaged by denial of a permit).

- Existing development on lots. Two contiguous lots owned by the same person must be combined for regulatory takings purpose even if one of the lots is fully developed with a single-family home. *See, e.g., Burke v. Board of Adjustment*, 145 A.2d 790, 793 (N.J. Super. App. Div. 1958) (declaring that two adjacent lots in common ownership should not be merged because one lot had already been developed with a single-family dwelling).

- Treatment by state and local ordinances. Two legal, substandard lots must be combined for regulatory takings purposes despite being "grandfathered" and declared buildable for purposes of residential construction. *See, e.g.*, Wis. Stat. § 59.692(2m) and Wis. Admin. Code § NR 115.05(1)(a)3 (declaring that all substandard lots in the shoreland zone can be used as a building site if the lot (a) was never merged within another lot by the owner, (b) has never been developed with a structure placed partly upon an adjacent lot, and (c) is developed to comply with all other ordinance requirements).

- Number of lots. Two contiguous lots owned by the same person must be treated the same as 100 contiguous lots owned by the same person. *See, e.g., Loveladies Harbor, Inc. v. United*

States, 28 F.3d 1171(Fed. Cir. 1994) (rejecting a claim that the whole parcel should include an entire 250-acre development project with lots that have been sold and developed over more than 40 years).

- Zoning on parcels. Three contiguous lots, each with a different zoning classification (residential, commercial, and agricultural), must be combined for regulatory takings purposes. *See, e.g., Twain Harte Associates, Ltd. v. County of Tuolumne*, 265 Cal.Rptr. 737 (Cal. Ct. App. 1990) (reversing summary judgment on the merger of two differently zoned properties (1.7-acre parcel zoned "open space zoning" and 8.5-acre parcel zoned commercial) for purposes of evaluating a regulatory taking).

- Treatment by government. Four contiguous lots treated separately for property tax purposes must be combined for regulatory takings purposes. *Spiegelberg*, 717 N.W. 2d at 643.

To avoid arbitrary and inequitable results under the Wisconsin Rule, other jurisdictions have adopted a more "flexible approach," looking at a variety of factors in determining the relevant parcel. *See, e.g., Machipongo Land & Coal Co., v. Dep't of Envtl. Protection*, 799 A.2d 751, 768-69 (Pa. 2002) (identifying the following factors: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings, the timing of the transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and the landowner's plans for

development); *Loveladies Harbor*, 28 F.3d at 1181 (1994) (recommending a "flexible approach, designed to account for factual nuances"); *Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) (using a "flexible approach" whereby the critical issue is the economic expectations of the property owner). Indeed, flexibility is the hallmark of this Court's regulatory takings cases. *See Tahoe-Sierra Preservation Council*, 535 U.S. at 321 (summarizing the Court's rejection of "categorical" and "per se" rules).

IV. THE WISCONSIN RULE DISCOURAGES THE COMMON OWNERSHIP OF ADJACENT LOTS.

By consolidating adjacent lots under common ownership, the Wisconsin Rule increases the financial risks of common ownership of adjacent lots. The Wisconsin Rule spreads the escalating cost of regulation across a larger denominator of land value and investment-backed expectations, making it less likely that a land-use regulation will be declared a regulatory taking. Greater exposure to unreasonable regulations increases the financial risk associated with the common ownership of adjacent lots. Creating a financial disincentive to common ownership of adjacent lots could adversely affect economic development and the real estate market.

Acquiring parcels of real estate increases the amount of contiguous acreage and creates different economic development opportunities. For example, owning a single commercial parcel less than a half-acre in size may limit the potential uses to office or retail, given the floor area and parking requirements found in most building and zoning codes. However, if the parcel is owned with adjacent parcels, the total acreage may allow for additional uses, such as

a gas station or a restaurant. The Wisconsin Rule discourages acquisition of adjacent parcels, suppressing the potential for a more comprehensive and diverse economic development area that includes hotels, mixed-use residential or a regional shopping center.

In addition, adjacent parcels are often acquired to avoid geographic or environmental constraints. For example, a parcel with a large wetland or steep sloping terrain may prompt the acquisition of an adjacent parcel that is relatively flat and dry to create more developable land. Given state or local regulations prohibiting development on or near steep slopes or wetlands, acquisition of the adjacent parcel expands development activity onto the more buildable parcel. The Wisconsin Rule deters this practice.

Homeowners also purchase adjacent lots for a variety of reasons. Some purchase adjacent lots for investment potential, especially in fast-growing areas. Others purchase adjacent lots to have extra room for the children to play or to create a privacy buffer from their neighbors. Owning an adjacent lot also provides control over the lot and its development. In some cases, owners of adjacent lots will place covenants or restrictions on the use of the lot before selling to ensure the use of the lot (e.g., the size or location of any building) is compatible with their neighboring home. Again, the Wisconsin Rule deters these practices.

The Wisconsin Rule discourages the purchase and common ownership of adjacent lots by increasing the financial risks of owning them. In response, some may regard common ownership of nonadjacent lots or ownership of adjacent lots by different legal entities as viable economic options. Purchasers of adjacent lots can arguably evaluate the risks and benefits of making

such an investment in light of the Wisconsin Rule. However, if property is transferred without the help of professional REALTORS®, attorneys, or other advisors and the transfer results in common ownership of adjacent properties (as apparently happened with the Murrs), the Wisconsin Rule harms these property owners. Moreover, if someone already owns adjacent lots, he or she will be disadvantaged by the Wisconsin Rule and suffer the financial consequences associated with it. Constitutional protections should not depend on arbitrary characteristics, including whether a property owner had the financial means or knowledge to hire advisors.

The game of *Monopoly* provides a useful analogy to illustrate the potential effect of the Wisconsin Rule on economic development, property owners and the real estate market. In *Monopoly*, as players roll the dice and move around the board, they attempt to acquire real estate based upon a variety of factors including location, price, and proximity to other property they own. While some players prefer to own property spread around the board, others prefer to own property that is contiguous with other properties in hopes of acquiring all the property in one color group. Then, the player benefits by charging additional amounts for properties improved with houses and hotels. The rules benefit the common ownership of contiguous property because they provide the owner with more options for changing the use.

If the rules of the game radically changed and players were penalized – not rewarded – for owning contiguous property, the game would be played differently. The ownership of contiguous property would be less desirable than the ownership of noncontiguous property. If the rules were changed *before* the game began, the players would adjust their

buying preferences accordingly and purchase only property that was not contiguous. If, on the other hand, the rules of the game changed *after* the game had begun, players who had already purchased contiguous property would be disadvantaged and the value of their property would decline.

Moreover, depending upon the nature of the rule change, players may be unable to build the houses or hotels on each of the parcels as intended when purchasing the property. They may be unable to sell or trade the property to other players depending upon the rule change, or if the other players would also be subject to the same penalties or restrictions related to ownership of the property.

This is not a game. The Wisconsin Rule treats the common ownership of adjacent lots differently than other lots and, as a result, treats the owners of those lots unfairly. The economic injuries caused by the St. Croix ordinance and the Wisconsin Rule should not be "disproportionately concentrated on a few persons" such as the Murrs. *See Penn Central*, 438 U.S. at 124.

CONCLUSION

For the reasons stated above, we join the Petitioners and request that this Court declare the Wisconsin Rule invalid and remand the case to the Wisconsin courts to determine whether the substandard lot provisions in St. Croix County's ordinance constitute a regulatory taking under the *Penn Central* balancing test.

Respectfully submitted,

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